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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

IN THE MATTER OF PENN CENTRAL TRANSPORTATION COMPANY, *Debtor*

RICHARD JOYCE SMITH, Trustee of the Property of the New York, New Haven and Hartford Railroad Company, Debtor, *Petitioner*,

v.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., and WILLARD WIRTZ, Trustees of the Property of Penn Central Transportation Company, Debtor; BANKERS TRUST COMPANY, as Mortgage Trustee; and MORGAN GUARANTY TRUST COMPANY, as Mortgage Trustee, *Respondents*

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Third Circuit

BRIEF FOR GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., AND WILLARD WIRTZ, TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR, IN OPPOSITION

Of Counsel:

EDWIN K. TAYLOR
Senior Corporate Counsel
Penn Central Transportation Company
1138 Six Penn Center Plaza
Philadelphia, Pennsylvania 19104

JOHN F. DEPODESTA
Reorganization Attorney
1808 Six Penn Center Plaza
Philadelphia, Pennsylvania 19104

CHARLES A. HORSKY
HUGH B. COX
BRICE M. CLAGETT
Covington & Burling
888 - 16th Street, N.W.
Washington, D. C. 20006
Special Counsel for the Trustees

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OPINIONS BELOW

The opinion of the District Court for the Eastern District of Pennsylvania (App. B-70-B-91 *), as

* All Appendix references are to the Appendix filed by petitioner with his petition for certiorari.

amended on January 7, 1972 (App. B-96), was entered on December 31, 1971, and is reported at 337 F.Supp. 779.

JURISDICTION

Petitioner's appeals to the Court of Appeals for the Third Circuit from several orders of the District Court have been briefed but not argued or submitted to the Court of Appeals. The jurisdiction of this Court is sought to be invoked under 28 U.S.C. Sec. 1254(1) and Rule 20 of the Rules of this Court.

STATUTES INVOLVED

Section 77(a) of the Bankruptcy Act (11 U.S.C. § 205 (a)) is set out in the Appendix to the petition in No. 71-1401 at pages A1-A4.

QUESTIONS PRESENTED

1. Whether the decision of the District Court declining an immediate adjudication of the claim of the New Haven Trustee that he was entitled to an equitable lien and a constructive trust against certain properties in the Penn Central estate, but granting protection to the New Haven Trustee pending an adjudication in an orderly fashion as a part of the adjudication of claims procedure, should be affirmed.

2. Whether any basis exists for concluding that the issue "is of such imperative public importance" as to "require immediate settlement in this Court" by review prior to decision by the Court of Appeals.

STATEMENT

The circumstances out of which the present case arose are already known to the Court, either from its opinion in *The New Haven Inclusion Cases,* 399 U.S. 392, or from the petitions and briefs filed in Nos. 71-

1401, 71-1451 and 71-1539, related proceedings which are presently pending before the Court. Our brief in opposition to certiorari in Nos. 17-1401 and 71-1451 sets out, at pages 3-13, a summary of the facts related to both those cases and the instant one, to which we respectfully refer the Court. We repeat here only those facts necessary to an understanding of the decisions of the District Court sought to be reviewed.

The recital can pick up in June 1971, when the District Court for the District of Connecticut (the New Haven court) filed an opinion in which it proposed to enter an order imposing a lien on all tangible former New Haven properties, and a constructive trust on the New Haven's former interest in certain income from Grand Central Terminal properties, all of which had been conveyed to Penn Central in December 1968, "free and clear of all liens, charges and encumbrances." Being advised of that opinion, the District Court for the District of Pennsylvania (the Philadelphia court) entered an order setting the claim of the New Haven down for hearing in July 1971, and meanwhile repeating and reaffirming its general stay order which it had entered at the outset of the Penn Central bankruptcy. This action is Order No. 296 (App. pp. B-15-B-17), one of the orders which the present petition seeks to review.

The New Haven court entered the order proposed in its opinion. The order was appealed to the Court of Appeals for the Second Circuit, and in March 1972 was reversed on the ground that the New Haven court had exceeded its jurisdiction. That decision is the subject of the petitions in Nos. 71-1401, 71-1451 and 71-1539. Meanwhile, the Philadelphia court, following a hearing, filed its own opinion and order relating to the

New Haven claim (Order 546, amended by Order 522; App. pp. B-70-B-91, B-96). The petition herein seeks review of these orders.

In summary, as we have already noted in our brief in opposition in Nos. 71-1401 and 71-1451, the Philadelphia court, *first,* concluded that the decision of this Court in the *New Haven Inclusion Cases* had not deprived it of its normal functions under Section 77, which include the responsibility..of determining the amount of an unsatisfied debt, deciding whether it is secured or unsecured, and classifying the various claimants for purposes of a reorganization plan. *Second,* it concluded (as the Court of Appeals for the Second Circuit did later) that since the New Haven assets were in the ownership and possession of Penn Central on the date of bankruptcy, the filing of Penn Central's Section 77 petition "vested exclusive jurisdiction over those assets in this [Philadelphia] court, and made it jurisdictionally impossible for any other court to impose liens upon them, except with the approval of this court." (App. p. B-81) *Third,* it noted that the New Haven Trustee had filed in May 1971 in the Penn Central proceedings a proof of claim for the same amount and with the same lien and constructive trust that it asserted in the proceedings before the New Haven court, and that the deadline for filing objections had not yet been fixed and many parties potentially affected by the New Haven claim had no notice or opportunity to object, and stated its belief that it would invade the "absolute constitutional right" of the other creditors to be heard were it now to adjudicate the New Haven claims.

Finally, it took precautions appropriate to protect the New Haven Trustee until the validity of the New

Haven claims can be determined. Its order provides (App. p. B-90):

> "That, without prejudice to the ultimate resolution of the merits of the claims asserted, the Trustee of the New York, New Haven & Hartford Railroad shall, unless and until otherwise ordered by this Court or an appellate court of competent jurisdiction, be deemed to have a lien, indeterminate in amount, and indeterminate as to priority, upon all of the real property and readily indentifiable tangible personal property (exclusive of rolling stock) conveyed to Penn Central by the said New Haven Trustee as of December 31, 1968, and remaining in possession of the Trustees of the Debtor as of June 11, 1971."

Appeals from those orders of the District Court were timely filed by petitioner, and briefing for the Court of Appeals for the Third Circuit was completed in August 1972. The appeals have not yet been heard.

ARGUMENT

The several orders of the Philadelphia court which the present petition would bring before the Court for review present no issues warranting review by the Court, and are most certainly not of the "imperative public importance" which is necessary to warrant this Court in superseding the review which will be accorded the orders by the Court of Appeals.

As the Statement above indicates, the District Court orders do not purport to adjudicate either the amount or the status of whatever claims the New Haven Trustee may have against the Penn Central estate. Indeed, as we point out in our brief in oppostion in Nos. 71-1401 and 71-1451, the whole problem of the status of the New

Haven claim remains inchoate. Neither the Commission nor any court has determined as of what date or on what basis the assets delivered by Penn Central to the New Haven in payment for its properties are to be valued. Accordingly, the amount of any unpaid claim that the New Haven may have against Penn Central is still indefinite. Neither the Commission nor any court has determined the form of the consideration that the New Haven is entitled to receive for any unpaid portion of its claim against the Penn Central estate. The Commission has not yet had an opportunity to carry forward its sensible suggestion to consolidate the Penn Central and the New Haven proceedings so that it may determine in a single and comprehensive setting what will be fair and equitable to the creditors of both estates. The Court should not, under these circumstances, undertake a resolution of the controversy.

Moreover, petitioner does not and cannot assert any threat of injury to his rights; the lien imposed by the Philadelphia court has accorded him adequate protection. The basis he does assert for invoking the extraordinary relief of certiorari before judgment is that the conclusion of the reorganization of the New Haven will be delayed, but petitioner does not suggest how a decision by this Court on the issues he seeks to bring before it would significantly shorten the New Haven reorganization proceedings. The petitioner's claims are inextricably involved in the Penn Central reorganization proceedings, and future Commission and court proceedings will be necessary before those claims can be presented to this Court in a context sufficiently concrete and particularized to make review appropriate.

The petition also seeks review of the rejection by the Philadelphia court of petitioner's claim that that court

was bound to accept the decision of the New Haven court on the merits of New Haven claims. This claim provides no independent ground for the present petition because it raises no question of "imperative public importance" that justifies review in advance of decision by the Court of Appeals.

We believe this contention by petitioner was without merit even when it was first made, because the New Haven court lacked jurisdiction over the *res*, because it had no *in personam* jurisdiction which would warrant according its decision *res judicata* effect, and because such an effect would be inconsistent with the policy of the Bankruptcy Act. Moreover, after the New Haven court's decision had been reversed for want of jurisdiction, it became clear that it could have no *res judicata* effect. See *Butler* v. *Eaton*, 141 U.S. 240; *Leader* v. *Apex Hosiery Co.*, 108 F.2d 71 (3d Cir. 1939), *aff'd*, 310 U.S. 469; 1B Moore, *Federal Practice*, ¶ 0.416[2] (1965). That the Court of Appeals has stayed its mandate pending decision by this Court on a petition for certiorari is irrelevant. See *Huron Holding Corp.* v. *Lincoln Mine Operating Co.*, 312 U.S. 183, 189; *Prager* v. *El Paso Nat'l Bank*, 417 F.2d 1111 (5th Cir. 1969); 1B Moore, *supra*, ¶ 0.416[3], pp. 2252-2253. In any event, this issue can appropriately be left to the Court of Appeals.

CONCLUSION

Wherefore, the petition for certiorari should be denied.

Respectfully submitted,

CHARLES A. HORSKY
HUGH B. COX
BRICE M. CLAGETT
Covington & Burling
888 - 16th Street, N.W.
Washington, D. C. 20006

Special Counsel for the Trustees

Of Counsel:

EDWIN K. TAYLOR
Senior Corporate Counsel
Penn Central Transportation Company
1138 Six Penn Center Plaza
Philadelphia, Pennsylvania
19104

JOHN F. DEPODESTA
Reorganization Attorney
1808 Six Penn Center Plaza
Philadelphia, Pennsylvania
19104

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